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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HEATHER ROLLINS, Plaintiff and Respondent, v. STACK & ASSOCIATES, CPAs, Defendant and Appellant.	D069390 (Super. Ct. No. 37-2015-00014288-CU-WT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Ferris & Britton, Evelyn R. Wiggins and W. Lee Biddle for Defendant and Appellant.

NTD Law, Nikolas T. Djordjevski; Gruenberg Law and Joshua D. Gruenberg for Plaintiff and Respondent.

Stack & Associates, CPAs (Stack) appeals from an order denying its motion to compel arbitration of claims asserted by its former employee, Heather Rollins. Stack

asserts undisputed evidence established that Rollins agreed to arbitrate employment disputes. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In early December 2014, Stack hired Rollins as a senior accountant. A few days after starting her employment, Rollins received an employee handbook (the handbook). The handbook contained an arbitration policy which provided that the employee agreed to arbitration in consideration of his or her employment. Attached to the handbook was an "At-Will Employment Agreement and Acknowledgement of Receipt of Employee Handbook" (acknowledgement). Rollins and a Stack representative signed the acknowledgement agreeing to abide by the policies and procedures contained in the handbook.

A few months after Rollins started her employment she took a leave of absence based on a doctor's certificate. The following month, when she was released to return to work, Rollins resigned her employment. Rollins filed this action alleging various employment related claims. Stack answered the complaint and moved to compel arbitration based on the arbitration policy in the handbook. Rollins opposed the request, arguing that she did not enter into a binding agreement to arbitrate. Alternatively, even if the handbook and acknowledgement could be construed as an agreement, she argued that the agreement was void for public policy reasons due to its attempted waiver of claims arising out of the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.).

The trial court denied the motion to compel arbitration, finding (among other things) that no agreement to arbitrate existed. The trial court noted that the acknowledgment Rollins signed did not reference the arbitration provision, and concluded that the acknowledgement was ambiguous "in that some of the language seems to indicate a binding agreement, while other language disavow[ed] the existence of a binding contract." The court declined to address the PAGA issue. Stack timely appealed.[1]

DISCUSSION

I. *Legal Principles*

The proponent of arbitration must prove, by a preponderance of the evidence, the existence of an agreement to arbitrate while the opponent of arbitration must prove, to the same standard, any defense to enforcement of the arbitration agreement. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) When the facts are undisputed, we review the trial court's denial of arbitration de novo. (*Ibid.*)

A court must order arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) The existence of an agreement to arbitrate requires the mutual consent of the parties to the purported agreement. (*HM DG,*

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[1] We requested and received supplemental briefing, assuming that we found the existence of a valid arbitration agreement, as to whether the entire arbitration agreement is void for public policy reasons due to its waiver of representative claims arising under PAGA, or whether the PAGA waiver is severable. The parties were also requested to address whether this court, or the trial court, should decide this issue. While ultimately not relevant to the resolution of this appeal, we appreciate the parties' submissions.

Inc. v. Amini (2013) 219 Cal.App.4th 1100, 1109.) "There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) "[O]rdinary rules of contract interpretation apply to arbitration agreements." (*Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 Cal.App.4th 1431, 1435.) A court should interpret a contract to give effect to the mutual intention of the parties, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. (Civ. Code, §§ 1636, 1644, 1647.) "A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach[.]' [Citation.] If possible, the court should give effect to every provision. [Citations.] An interpretation which renders part of the instrument to be surplusage should be avoided." (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.)

"[A]n agreement need not *expressly* provide for arbitration, but may do so in a secondary document which is incorporated by reference . . . ." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 639 (*Chan*).) For an agreement to incorporate a secondary document by reference the terms of the incorporated document must be known or easily available to the contracting parties, and the reference must be clear, unequivocal, and called to the attention of the other party. (*Id.* at p. 641.)

II. *Analysis*

We first examine whether Stack has proven the existence of an agreement to arbitrate. Turning to the handbook, it consisted of 22 pages and contained six sections

covering different topics such as hours of work, medical leave and standards of conduct. The first page of the handbook, section 1.2, stated it was designed to "summarize certain personnel policies and benefits" of Stack and "acquaint" employees with rules concerning their employment. This paragraph also stated that the handbook was "not a binding contract between [Stack] and its employees, nor [was] it intended to alter the at-will employment relationship between [them]." The handbook gave Stack "the right to revise, modify, delete, or add to any and all policies, procedures, work rules, or benefits" in the handbook, "except for the policy of at-will employment . . . ." Section 1.5 of the handbook, starting on the second page, contained a detailed arbitration policy which stated, in part: "In consideration of your employment with [Stack], its promise to arbitrate all employment-related disputes, and your receipt of the compensation . . . , you agree that any and all controversies, . . . arising out of . . . your employment . . . shall be subject to binding arbitration . . . ."

The handbook expressly provided that it was not intended to be a binding contract between Stack and its employees. From an employer's perspective, this language is understandable. The handbook covered a variety of topics and an express statement that the handbook was not intended to be a binding contract prevents employees from arguing that they are contractually entitled to anything covered in the handbook. The statement, however, also prevents Stack from asserting that employees are contractually bound by anything in the handbook.

We reject Stack's contention that the sentence in the handbook, stating that the handbook was not a binding contract, is limited to an employment contract. The

handbook provided it was "not a binding contract between [Stack] and its employees, nor [was] it intended to alter the at-will employment relationship between [them]." The sentence is written in the disjunctive and negates both the existence of a binding contract or any employment relationship other than one that is at-will. The plain language of the handbook made clear that the parties did not intend to create a contractual relationship. Nothing in the handbook or the acknowledgment suggest that the parties intended to exempt the arbitration policy. We note that the arbitration policy provided that the parties agreed to arbitration instead of civil litigation. At most, this statement created an ambiguity as to whether the parties agreed to be contractually bound by the arbitration policy, particularly in light of the earlier language stating that the handbook was not a binding contract. In the employment context, any ambiguities in written agreements prepared entirely by the employer must be construed against the drafting employer. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248.)

We next examine the acknowledgement, signed by Rollins and a Stack representative. The acknowledgement stated:

> "I acknowledge that I have been provided with a copy of the . . . [h]andbook, which contains important information on [Stack's] policies, procedures and benefits, including the policies on Anti-Harassment/Discrimination, Substance Use and Abuse and Confidentiality. I understand that I am responsible for familiarizing myself with the policies in this handbook and agree to comply with all rules applicable to me.
>
> "I understand and agree that the policies described in the handbook are intended as a guide only and do not constitute a contract of employment. I specifically understand and agree that the employment relationship between [Stack] and me is at-will and can be terminated by [Stack] or me at any time, with or without cause or

> notice. . . . This is the entire agreement between [Stack] and me regarding this subject. All prior or contemporaneous inconsistent agreements are superseded.
>
> "I understand that [Stack] reserves the right to make changes to its policies, procedures or benefits at any time at its discretion. However, the at-will employment agreement can be modified only in the manner specified above. I further understand that [Stack] reserves the right to interpret its policies or to vary its procedures as it deems necessary or appropriate.
>
> "I have received the . . . [h]andbook. I have read (or will read) and agree to abide by the policies and procedures contained in the [h]andbook."

The acknowledgement brought the handbook containing the arbitration provision to Rollins's attention and clearly and unequivocally referenced the handbook. The handbook was also easily available to Rollins as she received it and the acknowledgement as a single bound document. Thus, the acknowledgement signed by Rollins incorporated by reference the handbook containing the arbitration provision. (*Chan*, *supra*, 178 Cal.App.3d at p. 639.) The question, however, is whether the signatures on the acknowledgment expressed the mutual intent of the parties to be contractually bound by the policies, benefits and rules contained in the handbook, including the arbitration policy.

The acknowledgement is titled "At-Will Employment Agreement and Acknowledgement of Receipt of Employee Handbook." This title suggests that the parties agreed that the employee's employment would be at-will and that the employee had received a copy of the handbook. Nothing in the title suggests that the parties agreed to arbitrate all employment disputes. Similarly, the acknowledgement specifically

mentioned certain policies in the handbook by name, but did not mention the arbitration policy. Rather, the acknowledgement reiterated that the handbook "contain[ed] important information" and that the policies in the handbook were "intended as a guide only and do not constitute a contract of employment."

In the acknowledgement, Rollins expressed her understanding that she was responsible for familiarizing herself with the policies in the handbook and that she agreed "to comply with all rules applicable" to her. The acknowledgment did not specify which rules in the handbook applied to Rollins. Although the last line of the acknowledgement stated that Rollins "agree[d] to abide by the policies and procedures contained in the [h]andbook," this agreement is rendered ambiguous by the earlier statement in the acknowledgment that the handbook was "intended as a guide only . . . ." As our high court noted, " '[t]he rule requiring the resolution of ambiguities against the drafting party "applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language." ' " (*Sandquist v. Lebo Automotive, Inc.*, *supra*, 1 Cal.4th at p. 248.)

Finally, the acknowledgement expressed Rollins's agreement that her employment would be at-will, that nothing in the handbook modified Stack's at-will employment policy and this was the "entire agreement between [Stack] and [Rollins] regarding this subject." Reading all of the provisions of the acknowledgment in context suggests that by signing the acknowledgement the parties agreed that Rollins's employment would be at-will. We reject Stack's contention that Rollins's argument renders execution of the

acknowledgment to be a meaningless act. The acknowledgement unambiguously expressed the mutual intent of the parties that Rollins's employment was at-will. Stack could have drafted the acknowledgment to unambiguously state that by signing the acknowledgement, the employee agreed that the arbitration policy in the handbook constituted a binding legal contract between the parties. Better yet, Stack could remove the arbitration "policy" from the handbook and have the employee execute a separate arbitration agreement.

We are not persuaded by Stack's argument that Rollins's continued employment constituted an implied agreement to the arbitration policy contained in the handbook. Nothing in either the handbook or the acknowledgment put Rollins on notice that, by not quitting her job, she was somehow entering into a binding agreement to arbitrate all employment disputes. This case differs from *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373. In *Harris*, the employer attached its alternative dispute resolution agreement as an appendix to its handbook and required that the employee execute an acknowledgement that he or she had received both the handbook and alternative dispute resolution agreement. (*Id.* at p. 377.) Additionally, the alternative dispute resolution agreement expressly stated, "If Employee voluntarily continues his/her employment with [employer] . . . , Employee will be deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth herein without exception." (*Id.* at p. 379.)

The trial court did not err in denying Stack's motion to compel arbitration. Accordingly, we need not address the other issues raised by the parties, including Stack's

assertion that the trial court erred in applying a heightened standard in construing the arbitration policy. Even assuming, without deciding, that the trial court applied an improper standard, our review is de novo. (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

DISPOSITION

The order denying appellant's motion to compel arbitration is affirmed. Rollins is awarded her costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.